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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY

DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOSEPH NICHOLS,
CDC #H-87217,

Plaintiff,

vs.

LAIRD, Correctional Officer Sergeant,
et al.,

Defendants.

Civil No. 10-1678 W (BGS)

ORDER:

**(1) DENYING MOTION TO
PROCEED *IN FORMA PAUPERIS*
AS BARRED BY 28 U.S.C. § 1915(g)
[Doc. No. 2]**

AND

**(2) DISMISSING CASE FOR
FAILURE TO PAY FILING
FEE REQUIRED BY
28 U.S.C. § 1914(a)**

Plaintiff, a state prisoner proceeding pro se, and currently incarcerated at Salinas Valley State Prison in Soledad, California, has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the civil filing fee required by 28 U.S.C. § 1914(a); instead, he has submitted a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2].

A. Motion to Proceed IFP

As Plaintiff is well aware, section 1915 of Title 28 of the United States Code allows certain litigants to pursue civil litigation IFP, that is, without the full prepayment of fees or costs.

1 28 U.S.C. § 1915(a)(2). However, the Prison Litigation Reform Act (“PLRA”) amended section
 2 1915 to preclude the privilege to proceed IFP:

3 . . . if the prisoner has, on 3 or more prior occasions, while
 4 incarcerated or detained in any facility, brought an action or appeal
 5 in a court of the United States that was dismissed on the grounds
 6 that it is frivolous, malicious, or fails to state a claim upon which
 relief can be granted, unless the prisoner is under imminent danger
 of serious physical injury.

7 28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’ provision.”
 8 *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005) (hereafter “*Andrews*”). “Pursuant to
 9 § 1915(g), a prisoner with three strikes or more cannot proceed IFP.” *Id.*; see also *Andrews v.*
 10 *Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter “*Cervantes*”) (under the PLRA,
 11 “[p]risoners who have repeatedly brought unsuccessful suits may entirely be barred from IFP
 12 status under the three strikes rule[.]”). The objective of the PLRA is to further “the
 13 congressional goal of reducing frivolous prisoner litigation in federal court.” *Tierney v. Kupers*,
 14 128 F.3d 1310, 1312 (9th Cir. 1997).

15 “‘Strikes’ are prior cases or appeals, brought while the plaintiff was a prisoner, which
 16 were dismissed on the ground that they were frivolous, malicious, or fail[ed] to state a claim.”
 17 *Andrews*, 398 F.3d at 1116 n.1 (citation omitted). Once a prisoner has accumulated three strikes,
 18 he is prohibited by section 1915(g) from pursuing any other IFP action in federal court unless
 19 he can show he is facing “imminent danger of serious physical injury.” See 28 U.S.C. § 1915(g);
 20 *Cervantes*, 493 F.3d at 1051-52 (noting § 1915(g)’s exception for IFP complaints which “make[]
 21 a plausible allegation that the prisoner faced ‘imminent danger of serious physical injury’ at the
 22 time of filing.”).¹

23 While the PLRA does not require a prisoner to declare that § 1915(g) does not bar his
 24 request to proceed IFP, *Andrews*, 398 F.3d at 1119, “[i]n some instances, the district court

26 ¹ The Ninth Circuit has held that section 1915(g) does not violate a prisoner’s right to access to
 27 the courts, due process or equal protection; nor does it violate separation of powers principles or operate
 28 as an ex post facto law. *Rodriguez v. Cook*, 169 F.3d 1176, 1179-82 (9th Cir. 1999); see also *Andrews*,
 398 F.3d at 1123 (noting constitutionality of § 1915(g), but recognizing that “serious constitutional
 concerns would arise if § 1915(g) were applied to preclude those prisoners who had filed actions who
 were not ‘frivolous, malicious, or fail[ing] to state a claim’ from proceeding IFP.”).

1 docket records may be sufficient to show that a prior dismissal satisfies at least one of the criteria
 2 under § 1915(g) and therefore counts as a strike.” *Id.* at 1120. When applying 28 U.S.C.
 3 § 1915(g), however, the court must “conduct a careful evaluation of the order dismissing an
 4 action, and other relevant information,” before determining that the action “was dismissed
 5 because it was frivolous, malicious or failed to state a claim,” since “not all unsuccessful cases
 6 qualify as a strike under § 1915(g).” *Id.* at 1121.

7 The Ninth Circuit has held that “the phrase ‘fails to state a claim on which relief may be
 8 granted,’ as used elsewhere in § 1915, ‘parallels the language of Federal Rule of Civil Procedure
 9 12(b)(6).’” *Id.* (quoting *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)). *Andrews*
 10 further holds that a case is “frivolous” for purposes of § 1915(g) “if it is of little weight or
 11 importance” or “ha[s] no basis in law or fact.” 398 F.3d at 1121 (citations omitted); *see also*
 12 *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (“[A] complaint, containing as it does both factual
 13 allegations and legal conclusions, is frivolous [under 28 U.S.C. § 1915] where it lacks an
 14 arguable basis in either law or in fact [The] term ‘frivolous,’ when applied to a complaint,
 15 embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.”). “A
 16 case is malicious if it was filed with the intention or desire to harm another.” *Andrews*, 398 F.3d
 17 at 1121 (quotation and citation omitted).

18 **B. Application of 28 U.S.C. § 1915(g)**

19 As an initial matter, the Court has carefully reviewed Plaintiff’s Complaint and has
 20 ascertained that it makes no “plausible allegation” to suggest Plaintiff “faced ‘imminent danger
 21 of serious physical injury’ at the time of filing.” *Cervantes*, 493 F.3d at 1055 (quoting 28
 22 U.S.C. § 1915(g)). While difficult to decipher, Plaintiff’s Complaint seeks to re-allege
 23 deprivations of personal property and Eighth Amendment violations against Richard J. Donovan
 24 Correctional Facility officials dating back to March 2001.

25 However, these types of allegations—all discrete incidents of alleged wrongdoing by
 26 prison officials occurring more than seven years ago—are simply insufficient to show the
 27 “imminent danger of serious physical injury” required to overcome § 1915(g)’s bar. *Cervantes*,
 28 493 F.3d at 1053 (“[T]he availability of the exception turns on conditions a prisoner faced at

1 the time the complaint was filed, *not at some earlier ... time.*") (emphasis added). Therefore,
 2 Plaintiff may be barred from proceeding IFP in this action if he has on three prior occasions had
 3 civil actions or appeals dismissed as frivolous, malicious or for failing to state a claim. *See* 28
 4 U.S.C. § 1915(g).

5 A court "'may take notice of proceedings in other courts, both within and without the
 6 federal judicial system, if those proceedings have a direct relation to matters at issue.'" *Bias*
 7 *v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d
 8 801, 803 n.2 (9th Cir. 2002)); *see also United States ex rel. Robinson Rancheria Citizens*
 9 *Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). Here, the Court takes judicial notice
 10 that Plaintiff has had nine prior prisoner civil actions dismissed in the Northern and Southern
 11 Districts of California on the grounds that they were frivolous, malicious, or failed to state a
 12 claim upon which relief may be granted pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A.

13 They are:

- 14 1) *Nichols v. Weissberg*, 2001 WL 678637 (N. D. Cal. June 8, 2001 Order of
 15 Dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) in Civil Case No. 01-2159
 16 VRW (PR) [Doc. No. 4]);
- 17 2) *Nichols v. Weissberg*, 2001 WL 761310 (N. D. Cal. June 29, 2001 Order of
 18 Dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) in Civil Case No. 01-2447
 19 VRW (PR) [Doc. No. 3]);
- 20 3) *Nichols v. Hunt*, Civil Case No. 01-1798 L (LAB) (S.D. Cal. Oct. 9, 2002 Order
 21 Dismissing First Amended Complaint for failing to state a claim pursuant to 28
 22 U.S.C. §§ 1915(e)(2)(b) & 1915A(b) [Doc. No. 14]);
- 23 4) *Nichols v. Hunt*, Civil Case No. 02-0300 K (NLS) (S.D. Cal. April 24, 2002
 24 Order dismissing action as frivolous pursuant to 28 U.S.C. § 1915A(b)(1) [Doc.
 25 No. 4]);
- 26 5) *Nichols v. Magnum*, Civil Case No. 02-1272 (S.D. Cal. July 17, 2002 Order
 27 dismissing Complaint for failing to state a claim pursuant to 28 U.S.C.
 28 §§ 1915(e)(2) and 1915A(b) [Doc. No. 3]);

- 1 6) *Nichols v. Logan*, Civil Case No. 04-2533 H (NLS) (S.D. Cal. Dec. 29, 2004
2 Order dismissing action as frivolous pursuant to 28 U.S.C. § 1915A(b)(1) [Doc.
3 No. 3]);
- 4 7) *Nichols v. Biggs*, Civil Case No. 03-1476 L (LSP) (S.D. Cal. Aug. 27, 2003
5 Order dismissing action as frivolous pursuant to 28 U.S.C. § 1915A(b)(1) [Doc.
6 No. 4]);
- 7 8) *Nichols v. Laird*, Civil Case No. 04-1662 J (PCL) (S.D. Cal. Sept. 17, 2004 Order
8 denying Motion to Proceed *In Forma Pauperis* and dismissing action for failing
9 to state a claim pursuant to 28 U.S.C. § 1915A(b)(2) [Doc. No. 3];
- 10 9) *Nichols v. Hunt*, Civil Case No. 04-2192 W (PCL) (S.D. Cal. Dec. 27, 2004
11 Order denying Motion to Proceed *In Forma Pauperis* and dismissing action as
12 frivolous pursuant to 28 U.S.C. § 1915A(b)(1) [Doc. No. 7]).

13 Accordingly, because Plaintiff has, while incarcerated, accumulated far more than three
14 “strikes” pursuant to § 1915(g), and he fails to make a “plausible allegation” that he faced
15 imminent danger of serious physical injury at the time he filed this Complaint, he is not entitled
16 to the privilege of proceeding IFP in this action. *See Cervantes*, 493 F.3d at 1055; *Rodriguez*,
17 169 F.3d at 1180 (finding that 28 U.S.C. § 1915(g) “does not prevent all prisoners from
18 accessing the courts; it only precludes prisoners with a history of abusing the legal system from
19 continuing to abuse it while enjoying IFP status”); *see also Franklin v. Murphy*, 745 F.2d 1221,
20 1231 (9th Cir. 1984) (“[C]ourt permission to proceed IFP is itself a matter of privilege and not
21 right.”).

22 C. Conclusion and Order

23 For the reasons set forth above, the Court hereby:

24 (1) **DENIES** Plaintiff’s Motion to Proceed IFP [Doc. No. 2] pursuant to 28 U.S.C.
25 § 1915(g) and **DISMISSES** this action for failure to pay the \$350 civil filing fee required by
26 28 U.S.C. § 1914(a); and

27 ///

28 ///

1 (2) **CERTIFIES** that an IFP appeal from this Order would be frivolous and therefore,
2 would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3). *See Coppedge v. United*
3 *States*, 369 U.S. 438, 445 (1962); *Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977)
4 (indigent appellant is permitted to proceed IFP on appeal only if appeal would not be frivolous).

5 The Clerk shall close the file.

6 **IT IS SO ORDERED.**

7
8 DATED: _____

8/12/10



HON. THOMAS J. WHELAN
United States District Judge